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No. 79-1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DAVID R. FREEMAN,
Director, State of Missouri Department of Social Services,
and
PHYLLIS J. RESER,
Director, State of Missouri Department of Social Services,
Division of Family Services,
Petitioners,

v.

REPRODUCTIVE HEALTH SERVICES
and
ROBERT H. DUEMLER, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

SUPREME COURT RULE NO. 34.2— GENERAL REQUIREMENTS

Pursuant to Supreme Court Rules Nos. 22.1 and 34.2, Respondents adopt Petitioners' "Statement of the Case" (Petitioners' Writ of Certiorari [P.W.C.] at 6-10), "Questions Presented" (P.W.C. at 2-3), "Opinions Below" (P.W.C. at 2), "Jurisdiction" (P.W.C. at 2), and "Constitutional Provisions, Statutes, and Federal Regulations Involved" (P.W.C. at 3-6), with the following brief exceptions.

1. The "Opinion and Order" of the District Court, entered January 26, 1979, is reported as *Freiman* v. *Walsh,* 481 F.Supp. 137 (W.D. Mo. 1979).

2. The suggestion in Petitioners' "Statement of the Case" (P.W.C. at 7), that the constitutionality of Petitioners' policy was not properly before the District Court, is erroneous and misleading. Not only was the District Court required to consider first any statutory conflict before proceeding to the constitutional issues (*Harris* v. *McRae,* ____ U.S. ____ [1980]) (Slip Opinion at 7), but Petitioners were fully aware of the issue looming large in this case at least 11 months prior to the District Court's decision. (See the District Court's "Order" dated February 21, 1978, to which both parties filed briefs in response, dealing directly and solely with the statutory conflict question under the Supremacy Clause.)

SUMMARY OF ARGUMENT

I

Although this Honorable Court has not expressly resolved the issue as to whether or not a State may enact a more restrictive standard for medicaid reimbursement of therapeutic abortions than that provided for in Title XIX of the Social Security Act (as amended by the Hyde Amendment) (42 United States Code, §1396 *et seq.*), this issue was impliedly answered in the negative by the recent decisions in *Harris* v. *McRae,* ____ U.S. ____ (June 30, 1980), and *Williams* v. *Zbaraz,* ____ U.S. ____ (June 30, 1980).

II

Without conceding the correctness of this Honorable Court's decisions in *Harris* v. *McRae, supra,* and *Williams* v. *Zbaraz, supra,* the constitutionality of a State policy consistent with and

parallel to the policy of the Hyde Amendment, as to the funding of therapeutic abortions under Title XIX of the Social Security Act, has been clearly decided by said cases.

III

The authority of the District Court to award attorneys' fees pursuant to 42 United States Code, §1988, for a violation of the Social Security Act, has been clearly decided by this Honorable Court in *Maher* v. *Gagne,* ____ U.S. ____ (June 25, 1980).

IV

Respondents at all stages of these proceedings were clearly the "prevailing party" pursuant to 42 United States Code, §1988, justifying the awards of attorneys' fees made to them.

V

42 United States Code, §1988, is intended to be broadly interpreted to achieve its remedial purposes, and the proper award of attorneys' fees thereunder to a prevailing party by a federal court of appeals is intended, proper and traditional among the Circuits.

ARGUMENT

I

This Honorable Court in *Williams* v. *Zbaraz*, ____ U.S. ____ (June 30, 1980), noted that,

> "The Court of Appeals again reversed. *Zbaraz* v. *Quern*, 596 F.2d 196. Reaching the same conclusion as had the Court of Appeals for the First Circuit in *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, the court held that the Hyde Amendment 'alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment.' 596 F.2d, at 199. It further held, however, that a participating State may not, consistent with Title XIX, withhold funding for those medically necessary abortions for which federal reimbursement is available under the Hyde Amendment.[3] Accordingly, the case was remanded to the District Court with instructions that the permanent injunction be modified so as to require continued state funding only 'for those abortions fundable under the Hyde Amendment.' *Id.*, at 202.
>
> [3]Neither the Director of the Illinois Department of Public Aid nor the intervening-physicians sought review of the judgment of the Court of Appeals. The District Court in the proceedings now on appeal proceeded on the premise that Title XIX obligates Illinois to fund all abortions reimbursable under the Hyde Amendment. That issue, therefore, is not before us on these appeals." (Slip Opinion at 4-5).

While Congress, under the authority of *Harris* v. *McRae, supra,* and *Williams* v. *Zbaraz, supra,* may choose to specify those classes of therapeutic abortions reimbursable under Title XIX, the State may not, consistent with its participation in the program, adopt a stricter standard than that standard enunciated on the federal level by Congress. This has been the clear

holding of the Courts. *Preterm, Inc.* v. *Dukakis,* 591 F.2d 121, 134 (1st Cir. 1979), *cert. denied* sub nom. *Dukakis* v. *King,* 441 U.S. 952 (1979); *Zbaraz* v. *Quern,* 596 F.2d 196, 202 (7th Cir. 1979), *reversed on other grounds* sub nom. *Williams* v. *Zbaraz,* ____ U.S. ____ (June 30, 1980); *Doe* v. *Kenley,* 584 F.2d 1362, 1366 (4th Cir. 1978); *Roe* v. *Casey,* 464 F.Supp. 487, 503 (E.D.Pa. 1978); *Emma G.* v. *Edwards,* 434 F.Supp. 1048, 1050 (E.D.La. 1977); *Smith* v. *Ginsburg* (No. 75-030CH, S.D. W.Va., May 9, 1978); and *Right to Choose* v. *Byrne* (No. C3817-77, Sup.Ct. N.J., July 7, 1978).

The constitutionality of the Hyde Amendment does not grant free license to Title XIX participating States to adopt policies even more restrictive than the Amendment itself.

II

Without conceding the correctness of this Honorable Court's decisions on June 30, 1980, in *Harris* v. *McRae, supra,* and *Williams* v. *Zbaraz, supra,* the constitutionality of a State policy consistent with and parallel to the policy of the Hyde Amendment, as to the funding of therapeutic abortions under Title XIX of the Social Security Act, has been clearly decided in those cases.

III

The authority of the Courts to award attorneys' fees pursuant to 42 United States Code, §1988, for a violation of the Social Security Act, has been clearly decided by this Honorable Court in *Maine* v. *Thiboutot,* ____ U.S. ____, 48 L.W. 4859 (June 25, 1980) and *Maher* v. *Gagne,* ____ U.S. ____, 48 L.W. 4891 (June 25, 1980), wherein this Honorable Court held,

> "In short, there can be no question that Congress passed the Fees Act anticipating that it would apply to statutory §1983 cl[illegible]ns." *Maine* v. *Thiboutot, supra,* 48 L.W. at 4862.

> "In *Maine* v. *Thiboutot*, ____ U.S. ____, decided this day, we held that §1988 applies to all types of §1983 actions, including actions based solely on Social Security Act violations." *Maher* v. *Gagne, supra,* 48 L.W. at 4893.

The fee award by the District Court in this cause was based entirely upon the statutory violation of Title XIX and the District Court's opinion is consistent and in accord with this Honorable Court's decisions in *McRae, supra,* and *Zbaraz, supra.*

IV

Relative to the statutory issue posed by Respondents in their challenge to Petitioners' policy, Respondents have clearly been the prevailing party at all levels of these proceedings. Under any of the various definitions and interpretations of "prevailing party", Respondents amply qualify.

> "5. The mechanical division of claimed hours into those expended on issues on which the plaintiff ultimately prevailed and those expended on issues on which the plaintiff did not, with compensation given only for the former, ignores the interrelated nature of many prevailing and non-prevailing claims. *See, e.g., Smith* v. *Fletcher,* 559 F.2d 1014, 1018 n.9 (5th Cir. 1977). Indeed, it is often difficult to characterize claims in one way or the other, particularly when the claims are constitutional ones which the court deliberately chose not to reach. Under such circumstances, it would seem to be manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious nonconstitutional claims, and who thereby facilitate the federal policy of avoiding unnecessary constitutional decisionmaking, by flatly refusing any compensation for claims not reached because, as to those claims, they have not 'prevailed'. *See Southeast Legal Defense Group* v. *Adams,* 436 F.Supp. 891, 895

(D.Ore.1977)." *Brown* v. *Bathke,* 588 F.2d 634, 637-638 at n.5 (8th Cir. 1978).

"* * * a plaintiff is a 'prevailing party' * * * if he essentially succeeds in obtaining the relief he seeks in his claims on the merits." *Bagby* v. *Beal,* 606 F.2d 411, 415 (3rd Cir. 1979).

"* * * we conclude that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Nadeau* v. *Helgemoe,* 581 F.2d 275, 278-279 (1st Cir. 1978).

V

Petitioners erroneously maintain that 42 United States Code, §1988, permits only District Courts to award attorneys' fees and that Circuit Courts are prohibited from awarding such fees. "The Fees Award Act must be liberally construed to achieve these ends." *Dennis* v. *Chang,* 611 F.2d 1302, 1306 (9th Cir. 1980).

The Fifth Circuit has expressly held that pursuant to §1988, "* * * this court has discretion to award costs and fees arising out of an appeal to this court * * *." *Universal Amusement Co., Inc.* v. *Vance,* 587 F.2d 159, 172-173 (5th Cir. 1978), *affirmed* per curiam, ____ U.S. ____ (March 18, 1980).

Petitioners' contention that only federal District Courts may award attorneys' fees under §1988, has recently been refuted by this Honorable Court in *Maher* v. *Gagne, supra.* "* * * the fee provision is part of the §1983 remedy whether the action is brought in federal or state court." 48 L.W. at 4862. If such fees are awardable in state court proceedings, surely they are awardable in federal appellate proceedings. To disallow a proper allowance of fees in the appellate defense of a District Court victory would totally undermine the intent and thrust of the Fees Award Act.

CONCLUSION

In conclusion, Respondents pray that the Petition for Writ of Certiorari be denied, in such fashion to affirm the opinion of the District Court in this cause and the opinion of the Appellate Court in this cause as it relates to the award of fees and costs.

Respectfully submitted,

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